Supreme Court, U.S.
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No. - _____

In The
Supreme Court Of The United States

MARTIN S. MCKAY,

Petitioner,

UNITED STATES OF AMERICA,

Intervenor,

v.

BROOK THOMPSON,
Individually and as
Coordinator of Elections,
State of Tennessee,

RILEY C. DARNELL,
Secretary of State,
State of Tennessee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[Entered 10/27/00]

No. 99-6598

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTIN S. MCKAY,
Plaintiff-Appellant,

UNITED STATES OF AMERICA,
Intervenor,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary Of State,
State Of Tennessee,
Defendants-Appellees,

BEFORE: KENNEDY and NORRIS, Circuit Judges; and KATZ,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

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* Hon. David A. Katz, United States District Court for the Northern District of Ohio, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
CLERK

APPENDIX B

[Entered 09/18/00]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTIN S. MCKAY,
Plaintiff-Appellant,

UNITED STATES OF AMERICA,
Intervenor,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendants-Appellees,

CAROLYN JACKSON, individually and as
Administrator of Elections,
Hamilton County, Tennessee,
CLAUDE RAMSEY, County Executive,
Hamilton County, Tennessee,

Defendants.

No. 99-6598

Appeal from the United States District Court

for the Eastern District of Tennessee at Chattanooga.
No. 98-00354--Curtis L. Collier, District Judge.

Submitted: August 1, 2000

Decided and Filed: September 18, 2000

Before: KENNEDY and NORRIS, Circuit Judges; KATZ, District Judge.*

COUNSEL

ON BRIEF:

Stephanie R. Marcus, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Intervenor.
Janet M. Kleinfelter, OFFICE OF THE ATTORNEY GENERAL, FINANCIAL DIVISION, Nashville, Tennessee, for Appellee.
Martin S. McKay, Chattanooga, Tennessee, pro se.

OPINION

ALAN E. NORRIS, Circuit Judge. *Pro se* plaintiff Martin S. McKay brought suit in district court against two

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* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

Tennessee state election officials and two Hamilton county election officials, in their official and individual capacities.[1] McKay wishes to stop Tennessee from continuing its practice of requiring its citizens to disclose their social security numbers as a precondition to voter registration. The district court granted summary judgment for defendants. McKay now appeals. Upon de novo review, we affirm for the reasons stated below.

I.

A. Statutory Construction of the Tennessee Statute

We begin by noting that the Tennessee code provides that: "[a] citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter *unless the citizen is disqualified under the provisions of this title* or under a judgment of infamy pursuant to § 40-20-112." TENN. CODE ANN. § 2-2-102 (1994) (emphasis added). Therefore, other provisions of the title may disqualify a citizen for failing to submit a social security number during the registration process. We have been unable to locate a published Tennessee state court decision indicating whether Tennessee law actually requires social security numbers for voter registration.[2]

In the case at bar the Tennessee Coordinator of Elections and the Tennessee Secretary of State, both defendants in this litigation, have made a final administrative

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[1] The two county officials were dismissed from the case and are not parties to this appeal.

[2] An unpublished decision, *Carter v. Dunn*, No. 12507 (Tenn. Ct. App. 1976), suggests that social security number disclosure is mandatory.

determination that Tennessee law requires McKay to disclose his social security number in order to register to vote. We are reluctant to overrule such an interpretation when the meaning ascribed by state officials appears to be reasonable, presents no conflict with previous caselaw, and can be readily challenged by McKay in state court.

B. Privacy Act of 1974, Public L. No. 93-579, § 7

McKay argues Tennessee is prohibited by Public Law 93-579, section 7, an uncodified provision of the Privacy Act, from conditioning the right to vote upon the disclosure of one's social security number. *See* Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909 (1974).[3] To support

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[3] Section 7 provides that:

(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the [The] provisions of paragraph (1) of this subsection shall not apply with respect to –

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of a individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

this argument, he relies upon *McKay v. Altobello*, No. 96-3458, 1996 WL 266717 (E.D. La. May 16, 1997), a case he successfully litigated to force Louisiana to allow him to vote without disclosing his social security number.

The district court correctly distinguished *Altobello* on the ground that Tennessee, unlike Louisiana, had maintained "a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual." Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909. Tennessee enacted its statute requiring social security numbers for voter registration in 1972. The court also correctly concluded that when McKay failed to respond to the motion for summary judgment, he defaulted on his duty to produce affirmative evidence capable of raising a material question of fact about whether the state had a "system of records" in effect prior to the enactment of the Privacy Act. *See, e.g., Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (discussing nonmovant's affirmative burden). We decline to entertain the arguments regarding other material questions of fact raised for the first time in McKay's reply brief. *See United States v. Jerkins*, 871 F.2d 598, 602 n. 3 (6th Cir. 1989).

C. National Voter Registration Act, 42 U.S.C. § 1973gg-3(c)(2)(B)

McKay also points to section 2-2-116 of the Tennessee state code, which requires disclosure of a social security number as a pre-condition to voter registration. *See* TENN. CODE ANN. § 2-2-116 (Supp. 1999). He argues that this provision violates the National Voter Registration Act ("NVRA") because a social security number is not essential to accomplishing the limited permissible purposes identified in

42 U.S.C. § 1973gg-3(c)(2)(B). According to McKay, 42 U.S.C. § 1973gg-3(c)(2)(B) permits the state to only "require the minimum amount of information necessary" to prevent duplicate voter registration and determine whether he is eligible to vote.

The district court properly rejected McKay's argument. The NVRA does not specifically forbid use of social security numbers. As previously discussed, the Privacy Act contains a more specific "grandfather" provision that Congress intended to survive the more general provisions of the NVRA. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

D. Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B)

Count three of McKay's complaint alleged a violation of 42 U.S.C. § 1971(a)(2)(B), a provision of the Civil Rights Act of 1964. He argues that his social security number was not "material" to determining his qualification for voting, and therefore his omission of that information cannot be grounds for refusing his registration. The district court correctly dismissed this claim for lack of standing. Section 1971 is enforceable by the Attorney General, not by private citizens. *See* 42 U.S.C. § 1971(c); *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996).

D. Constitutional Claims as Enforced Pursuant to 42 U.S.C. § 1983

McKay asserts five constitutional claims in support of his 42 U.S.C. § 1983 action.

We reject McKay's first claim that his fundamental right to vote was unconstitutionally burdened by the social security number disclosure requirement. *See Greidinger v. Davis*, 988 F.2d 1344, 1352-54 & n.10 (4th Cir. 1993) (indicating that Virginia's voter registration scheme would not violate the fundamental right to vote if its scheme had merely provided for receipt and internal use of the social security number by Virginia electoral officials).

We also reject McKay's second claim that the enforcement of section 2-2-116 of the Tennessee state code unconstitutionally infringed upon his First Amendment right to free exercise of religion, as incorporated by the Fourteenth Amendment, by forcing him to violate his religious beliefs in order to vote.[4] A state law that is rationally related to a legitimate state purpose will be upheld against a free exercise claim, even in a "hybrid" situation involving other fundamental rights such as voting, so long as the law is generally applicable, not aimed at particular religious practices, and free of a system of particularized exceptions. *See Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990); *Kissinger v. Board of Trustees*, 5 F.3d 177, 179 (6th Cir. 1993). McKay's reliance upon *Leahy v. District of Columbia*, 833 F.2d 1046 (D.C. Cir. 1987), is misplaced because that case utilized the least restrictive means/compelling state interest standard subsequently overruled by *Smith*. *See City of Boerne v. Flores*, 521 U.S. 507, 512-14 (1997).

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[4] According to McKay, the biblical book of revelation, chapter 13, verses 16 through 18, warns against government use of universal identifiers as a condition for engaging in commerce or other vital activities such as voting.

McKay claims that the Tennessee statute violates the Privileges and Immunities Clause of Article IV of the Constitution. See U.S. CONST. art. IV, § 2, cl. 1. This clause requires only that states give to citizens of every other state the same privileges and immunities that their own citizens enjoy. *See Hague v. Committee for Indus. Org.*, 307 U.S. 496, 511 (1939). Defendants did not discriminate against McKay because everyone, whether a state citizen or not, was required to comply with the voter registration laws in order to vote in Tennessee.

McKay asserts he was deprived of his right to vote without procedural due process of law, a violation of the Fifth and Fourteenth Amendments, because he was disqualified as a voter without having been properly convicted of a crime. He also alleges a violation of the Privileges and Immunities Clause of the Fourteenth Amendment because his right to vote is unique to national citizenship and bestowed by operation of Constitutional and federal statutory law. *See Shapiro v. Thompson*, 394 U.S. 618, 667 (1969) (Harlan, J., dissenting); *Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 79-80 (1872). These claims fail because they are based upon the flawed proposition that Tennessee's social security number disclosure requirement violates a federal statute or deprives him of his constitutional rights of voting and free exercise of religion. *See, e.g., Storer v. French (In re Storer)*, 58 F.3d 1125, 1128 (6th Cir. 1995) (indicating that the Privileges and Immunities Clause of the Fourteenth Amendment affords no protection where Congress has imposed or authorized the infringement).

E. Eleventh Amendment Immunity and Denial of Certification to the Attorney General

The district court correctly determined that the Eleventh Amendment permits prospective injunctive relief, but not damage awards, for suits against individuals in their official capacities under 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989). However, as the United States points out on appeal as an intervening party, the court erred in adopting the defendant Tennessee officials' position that the Eleventh Amendment immunity barred McKay from gaining any relief for his claims under federal law because prospective injunctive relief was possible for him in theory. *See Lawson v. Shelby County, Tenn.*, 211 F.3d 331, 335 (6th Cir. 2000). Nonetheless, the district court's error does not affect the outcome of this case in light of our finding that all of McKay's claims are without substantive merit.

McKay also complains he was prejudiced by the district court's repeated refusal to certify his case to the United States Attorney General under 28 U.S.C. § 2403(a). Because of defendants' attempted invocation of Eleventh Amendment immunity against the Privacy Act claim, certification was arguably not discretionary for this case and should not have been delayed until the appellate stage of litigation. *See* 28 U.S.C. § 2403(a); *Jones v. City of Lubbock*, 727 F.2d 364, 372 (5th Cir. 1984); *Wallach v. Lieberman*, 366 F.2d 254, 257 (2d Cir. 1966). However, we decline to hold that the district court was without jurisdiction on the basis of a technical violation of the 28 U.S.C. § 2403 certification requirement because McKay's claims lack merit on their face; therefore he has suffered no harm as a result of the court's action. *See Wallach*, 366 F.2d at 258.[5]

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[5] Contrary to McKay's assertions, the technical certification violation occurred only with respect to the Privacy Act and has no relevance to 42 U.S.C. § 1971(c), a provision in the Civil Rights Act of 1964. Defendants asserted the

II.

We affirm the district court's grant of summary judgment.

Eleventh Amendment defense only against enforcement of the Privacy Act, and thus the constitutionality of the Civil Rights Act was never "drawn in question" as required to trigger 28 U.S.C. § 2403. The provision in 42 U.S.C. § 1971(c) does not help McKay because the provision merely allows the Attorney General to "institute ... [a] proper proceeding for preventive relief" instead of requiring certification or permission for intervention. *Compare* 42 U.S.C. § 1971(c) *with* 28 U.S.C. § 2403(a). Thus, McKay cannot evade his lack of standing for his Civil Rights Act claim by speculating that the Attorney General would have invoked 42 U.S.C. § 1971(c) on McKay's behalf if the case had been properly brought to her attention through certification under 28 U.S.C. § 2403.

APPENDIX C

[Entered 10/29/99]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee;
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendants

No. 1:98-CV-354
Judge Curtis L. Collier

ORDER

Before the court is a Motion by Defendant Brook Thompson, in his individual capacity and as Coordinator of elections for the State of Tennessee, and Defendant Riley Darnell, in his official capacity as Secretary of State for the State of Tennessee, (collectively "Defendants") for Summary

Judgement (Court File No. 27). Defendants filed a brief in support of their motion (Court File No. 29). Plaintiff Martin S. McKay ("McKay") did not file a response. McKay claims a Tennessee law (*Tenn. Code Ann.* 2-2-116) requiring an individual disclose and be identified by his or her Social Security number in order to register to vote violates the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973 *et seq.*, a provision of the Privacy Act of 1974, 5 U.S.C. § 552a, and the Civil Rights Act of 1964, 42 U.S.C. § 1971, as well as several provisions of the United States Constitution.

After reviewing all of the evidence in the light most favorable to Plaintiff, the Court concludes, as a matter of law, McKay cannot prove his federal statutory or constitutional claims at trial. Therefore, in accordance with the accompanying memorandum, Defendants Motion for Summary Judgement is **GRANTED.**

SO ORDERED.

ENTER:

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Entered 10/29/99]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendants

No. 1:98-CV-354
Judge Curtis L. Collier

MEMORANDUM

Before the court is a Motion by Defendant Brook Thompson, in his individual capacity and as Coordinator of elections for the State of Tennessee, and Defendant Riley Darnell, in his official capacity as Secretary of State for the State of Tennessee, (collectively "Defendants") for Summary

Judgement (Court File No. 27). Defendants filed a brief in support of their motion (Court File No. 29). Plaintiff Martin S. McKay ("McKay") did not file a response. McKay claims a Tennessee law (*Tenn. Code Ann.* 2-2-116) requiring an individual disclose and be identified by his or her Social Security number in order to register to vote violates the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973 *et seq.*, a provision of the Privacy Act of 1974, 5 U.S.C. § 552a, and the Civil Rights Act of 1964, 42 U.S.C. § 1971, as well as several provisions of the United States Constitution. For the following reasons the Court will **GRANT** Defendants' motion..

I. STANDARD OF REVIEW

Under *Fed. R. Civ. P.* 56(c), the Court will render summary judgement if there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. The burden is on the moving party to conclusively show no genuine issue of material fact exists, *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Kentucky Div., Horsemen's Benev. & Prot. Assoc., Inc. v. Turfway Park Racing Assoc., Inc.*, 20 F.3d 1406, 1411 (6th Cir. 1994), and the Court must view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oakland Gin Co., Inc. v. Marlow*, 44 F.3d 426,429 (6th Cir. 1995); *City Management Corp. v. U.S. Chemical Co., Inc.*, 43 F.3d 244, 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must

come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411; *see also Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-406 (6th cir. 1992) (holding courts do not have the responsibility to search *sua sponte* the record for genuine issues of material fact). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgement. *Celotex*, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgement mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes a fair minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgement. *Id.; Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benev.*, 20 F.3d at 1411.

II. RELEVANT FACTS

The relevant facts are not in dispute. On June 21, 1998, Plaintiff McKay attempted to register to vote during a voter registration drive at St. Stephen Catholic Church. After

being advised by individuals representing the Hamilton County Election Commission ("Election Commission") his SSN would be required in order to register, McKay declined to complete the application. According to McKay, disclosing his SSN in such a manner is contrary to his religious beliefs.[1] On June 30, 1998, while obtaining a Tennessee driver's license, McKay again decided not to register to vote because his SSN would have been required. Then, on July 29, 1998, McKay went to the office of the Election Commission and attempted to register to vote. However, McKay was again informed a SSN would be required.

On August 10, 1998, McKay returned to the Election Commission and spoke to the Administrator of Elections, Carolyn Jackson. McKay informed Jackson he had prevailed in litigation in Louisiana regarding that state's collection of SSN's on voter registration applications. Jackson still would not allow McKay to register to vote unless he provided his SSN. Nevertheless, on that same day, McKay completed a voter registration application and submitted it to the Election Commission. On September 3, 1998, McKay received an "Application for Voter Registration Status Notification" from the Election Commission which, in pertinent part, stated, "Your application for voter registration form is temporarily rejected [because] ... [y]ou failed to provide your social security number" (emphasis in original).

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[1] McKay contends "the language of Revelations [sic] [warns] of government use of universal identifiers as a condition of engaging in commerce or other vital activities such as voting" (Court File No. 1, pp. 13-14, n. 7). McKay "views the [SSN] as such a universal identifier" (*Id*). Apparently McKay refers to the biblical Book of Revelation, Chapter 13, verses 16 through 18.

Other significant events occurred with respect to McKay's attempts to register to vote. On August 17, 1998, McKay sent a facsimile to Defendant Brook Thompson, Coordinator of Elections for the State of Tennessee. In the facsimile, McKay listed the efforts he had taken to register to vote. McKay ended the correspondence with the following, "As per 42 U.S.C. 1973gg-9(b)(2) a period of 20 days is allotted to remedy this abridgement. If at that time, the violation is not resolved, I will file a complaint in U.S. District Court seeking injunctive, declaratory and/or other relief which may include, but is not limited to, monetary damages for violation of my constitutional right without due process." On September 10, 1998, McKay's attorney, Jes Beard, also spoke with Jackson, Thompson, and Beth Henry Robinson, an attorney in Thompson's office, regarding McKay's desire to register to vote. The position of the Election Commission was unchanged.

On October 14, 1998, McKay filed suit in this Court against Defendants Brook Thompson, individually and as Coordinator of Elections for the State of Tennessee; Riley Darnell, as Secretary of State for the State of Tennessee; Carolyn Jackson, individually and as Administrator of Elections for Hamilton County, Tennessee; and Claude Ramsey, as County Executive for Hamilton County, Tennessee (Court File No. 1). Jackson and Ramsey were subsequently dismissed from this action. McKay also filed a Motion for a Temporary Restraining Order (Court File No. 4). In the motion, McKay sought to enjoin the Defendants from continuing to enforce *Tenn. Code Ann.* § 2-2-116 with respect to requiring a SSN on voter registration applications. McKay also sought an order requiring the Defendants to register him to vote for the upcoming November, 1998 elections. Believing there would be no irreparable injury in the short period it would take to notify the Defendants, the

Court denied McKay's Motion for a Temporary Injunction. However, the court set a hearing for October 29, 1998 to determine the propriety of issuing a preliminary injunction. The Court held such a hearing on October 29 and 30, 1998 and in an order filed November 2, 1998, denied McKay's Motion for a Preliminary Injunction.

III. DISCUSSION

The motion the Court before reveals an unfortunate, yet all too frequent, occurrence. When facing a potentially dispositive motion, the non-movant chooses not to respond. Not responding works a disservice upon American jurisprudence: the adversary system serves the dual purposes of defending against meritorious cases and discarding those without merit. Courts disfavor reviewing a dispositive motion without the benefit of the non-movant's interpretation of applicable case authority or indication of significant, supporting facts, because rarely does a single perspective capture enough of the substance of a case to support comfortably a court's decision.

Yet, undoubtedly, it is not a court's responsibility to argue a party's position. The parties must litigate their cases. The Eastern District of Tennessee hopes to emphasize the importance of motion practice by signaling to parties that the "[f]ailure to respond to a motion may be deemed a waiver of any opposition to the relief sought." *Local Rules of the E.D. of Tenn.* 7.2. Courts hesitate to rely strictly on this type of rule and have developed other ways to manage cases efficiently and fairly. Invariably, though, the practical effect of failing to respond to a dispositive motion undermines the non-movant's case and very often produces the same result.

In Count One of his Complaint (Court File No. 1), McKay alleges a violation of the NVRA 42 U.S.C. § 1973gg-3(c)(2)(B). He argues this provision authorizes the state of Tennessee to collect only "the 'minimum amount of information necessary' to prevent duplicate voter registration and to determine whether [an applicant] is eligible to vote." In response, Defendants argue the NVRA in conjunction with related statutory schemes, specifically authorizes the state to use a person's SSN as a means of identifying voters. McKay argues in Count Two that *Tenn. Code Ann.* § 2-2-116 violates the Privacy Act of 1974, specifically Public Law 93-579, Section 7. The provision prevents state governments from denying an individual any rights, benefits or privileges provided by law simply because the individual refuses to furnish his SSN. Defendants maintain however the Tennessee statute falls within a "grandfather clause" exception to this provision allowing a state to require disclosure of a SSN provided the statutory scheme requiring disclosure was enacted prior to January 1, 1975. Additionally, Defendants raise an Eleventh Amendment sovereign immunity defense to McKay's Privacy Act claim.

In Count Three, McKay claims Tennessee's requirement of SSN disclosure also violates the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B). This provision forbids a state from denying:

> [T]he right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election.

42 U.S.C. § 1971(a)(2)(B) (1999). The Defendants argue this provision does not provide a private cause of action and may only be enforced by the Attorney General. McKay's final claim is asserted pursuant to 42 U.S.C. § 1983 for various constitutional violations, including unlawful abridgement of his right to vote and unconstitutional restrictions on his First Amendment right to free exercise of religion.

For purposes of clarity, the Court in its opinion addresses each of McKay's statutory claims in the order in which they are raised in his complaint. The discussion of statutory claims is then followed by an analysis of Plaintiff's constitutional challenges.

A. National Voting Rights Act, 42 U.S.C. § 1973gg-3(c)(2)(B)

In Count One of his Complaint, McKay asserts Tenn. Code Ann. § 2-2-116, requiring an individual to reveal his or her SSN as part of the voting registration process, violates the NVRA. Specifically, McKay maintains 42 U.S.C. § 1973gg-3(c)(2)(B) permits the state to require only the "'minimum amount of information necessary' to prevent duplicate voter registration and to determine whether plaintiff is eligible to vote," and because an individual's SSN is inessential to those limited purposes, Tennessee may not lawfully require it as a prerequisite to registration. In support of this argument, McKay points to the State's own practice of allowing individuals who do not have a SSN to register and maintains *Tenn. Code Ann.* § 2-2-102[2] sets forth the sole

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[2] "A citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter unless the citizen is disqualified under the provisions of this title or under a judgement of infamy pursuant to § 40-20-112."

requirements for eligibility as residence within the state and attainment of the age of legal majority (18).

The federal statutory provision to which McKay refers actually regulates the use of driver's license applications as simultaneous voter registration applications. Assuming for the sake of argument this statute applies to McKay's situation, its exact language provides the State may require only such information as is necessary to 1) "prevent duplicate registrations," and 2) "enable State election officials to assess the eligibility of the applicant and to administer voter registration and *other parts of the election process*." 42 U.S.C. § 1973gg-3(c)(2)(B) (1999) (emphasis added). Surely, preventing voter fraud is an essential part of the election process.

McKay, in his Complaint, acknowledges, "Tennessee uses [a SSN] only for the expressed purpose of determining if an individual is attempting to commit fraud by trying to register and to vote more than once," (Court File No. 1, p. 9). Often there are several voters with the same name and, at times, voters will have both the same name and the same birth date. A SSN provides an unique identifier to assist in the prevention of duplicate voter registration. While a few voters may not have a SSN, the vast majority of registrants will. As a result, SSN's provide an efficient and reliable means of identifying those applicants who may be trying to register more than once, as well as those applicants who are ineligible to vote because they have been convicted of a crime. This holds true even though the State might have to make occasional exceptions in the rare case an applicant does not have a SSN.

Tenn. Code Ann. § 2-2-102 (1998).

Based on this reasoning, the Court concludes a SSN falls within the "minimum amount of information necessary to, ... enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-3(c)(2)(B). The Court therefore holds the facts on this record, even when viewed in the light most favorable to McKay, would not support a finding *Tenn. Code Ann.* § 2-2-116 oversteps the authority granted by section 1973gg-3(2)(B) of the NVRA.

B. Privacy Act of 1974, Public Law 93-579, Section 7

McKay argues in Count Two of his Complaint that Tennessee is prohibited by Public Law 93-579, Section 7, an uncodified provision of the Privacy Act,[3] from conditioning the right to vote on the disclosure of one's SSN. Plaintiff relies on a Louisiana district court case in which he litigated the same issue, *McKay v. Altobello*, No. 96-3458 (E.D.La. May 16, 1997) (slip op., Judge Livaudais), to support his interpretation of this statute. After a review of that case, the Court concludes the situation at hand is distinguishable.

The decision in *Altobello* rested on Judge Livaudais's conclusion Louisiana failed to prove it fell within a statutory exemption allowing a state to require disclosure of SSN's during voter registration as long as the State maintained "a

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[3] Section 7(a)(1) can be found as an historical note to 5 U.S.C. § 552a, and provides: "It shall be unlawful for any Federal, State, or local government agency to deny any individual any right, benefit or privilege ... because of such individual's refusal to disclose his social security account number."

system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual." 5 U.S.C. § 7(a)(2) (1999). *Tenn. Code Ann.* § 2-2-116, enacted in 1972, specifically requires disclosure of the registrant's SSN.[4] In *Carter v. Dunn*, No. 12507 (Tenn. Ct. App. Dec. 3, 1976), the Tennessee Court of Appeals held section 2-2-116 requires this information as a means of identifying the registrant.

While McKay presented testimony at the preliminary injunction hearing that, at times, here in Hamilton County, different voter registration forms were utilized, and, on two or three occasions, a SSN was excluded, this evidence does not speak to whether Tennessee had a system of records in existence and operating before January 1, 1975. The uncontroverted record evidence proves Tennessee has required disclosure of one's SSN as a prerequisite for voter registration and has used that information as a means of identifying individual registrants since 1972. Section 2-2-116 therefore falls within the section 7(a)(2) exception for "a system of records [requiring the disclosure of one's SSN] in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual."

In addition to concluding section 2-2-116 is excepted from section 7(a)(1) of the Privacy Act, the Court holds McKay's suit against all Defendants in their official capacities is barred by the Eleventh Amendment. The eleventh

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[4] Section 2-2-116 provides an example of a voter registration form. The form contains a space for "Social Security number, if any." The statute further mandates the form "shall contain all the information required before being signed by the registrant." *Tenn. Code. Ann.* § 2-2-116.

Amendment immunizes the states from all suits in federal court brought by their own citizens or citizens of other states. *Seminole Tribe of Florida v. Florida*, 517 U.S. 53, 54 (1996). "[S]uits against state officers or employees, in their official capacities, are suits against the state. *Lawson v. Tennessee*, 7 F.Supp.2d 985, 988 (W.D.Tenn. 1998). Accordingly, the Defendants, having been sued in their official capacities, are treated as the state of Tennessee for purposes of the Court's Eleventh Amendment analysis. The States' sovereign immunity may only be abrogated through consent of the State or an act of Congress. *Id.* At 54-55. In this case, Defendants have raised an Eleventh Amendment immunity defense in response to McKay's Privacy Act claim. They have not consented to the Court's exercise of jurisdiction. As a result, Defendants in their official capacities, are only susceptible to suit in this case if Congress in passing the Privacy Act effectively abrogated the states' Eleventh Amendment sovereign immunity.

"In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity;' and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* At 55 (citations omitted). The Privacy Act does not contain any clear congressional statement of intention to abrogate the States' Eleventh Amendment immunity. Section 7, which has never been codified, clearly applies to both state and federal agencies. This provision, however, does not set forth any clear remedy for violation of its mandates. Instead, the courts have implied a cause of action for individuals who have been injured by an agency's failure to comply with section 7. *Greater Cleveland Welfare Rights Org. v. Butler*, 462 F.Supp. 1313, 1319-20 (N.D. Ohio 1978).

This implied right to sue fails to satisfy the "clear legislative statement," required in order to abridge the States' Eleventh Amendment immunity. Even a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985). Congress, in enacting Section 7, did not even clearly authorize a cause of action in federal court for violation of its provisions, and thus fell far short of the standard set by the Supreme Court for Congressional abrogation of the States' Eleventh Amendment sovereign immunity. The Eleventh Amendment, therefore, precludes an action by McKay against Defendants in their official capacities.

C. Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B)

Count Three of McKay's complaint alleges a violation of 42 U.S.C. § 1971(a)(2)(B), a provision of the Civil Rights Act of 1964. This statute provides:

> (2) No person acting under color of law shall –
>
> (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified to under State law to vote in such election; ...

McKay makes a persuasive argument his SSN is not "material" to determining his qualification for voting; and therefore, his omission of that information cannot be grounds for refusing his registration. He argues the qualifications for

voting are set forth at *Tenn. Code Ann.* § 2-2-102 and basically require only that the voter is a resident who has maintained the age of majority (18). SSN's, McKay maintains, are used only to determine whether a registrant is trying to perpetrate a fraud on the polls and not whether the person is in fact qualified to vote.

Regardless of the merits of his arguments, however, McKay lacks standing to enforce this particular statutory provision. The statutory language provides "the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proceeding for preventive relief," to remedy violation of the Act. Neither the statute, nor case law interpreting it, however, gives a private cause of action to individual citizens. *See Willing v. Lake Orion Community School Bd. Of Trustees*, 924 F.Supp. 815, 820 (E.D. Mich. 1996) ("Section 1971 ... is enforceable by the Attorney General, not by private citizens.").

D. Constitutional Claims Pursuant to 42 U.S.C. § 1983

In addition to asserting the statutory claims discussed above, McKay's complaint also requests, pursuant to 42 U.S.C. § 1983,[5] relief for several alleged constitutional violations. As a preliminary matter the Court notes suits against individuals in the official capacities for damages are the equivalent to suits against the State and are not cognizable in this Court under section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989) (holding state officials, sued in their official capacities, are not "persons" within meaning of section 1983 when sued for

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[5] "Section 1983 creates a federal cause of action for constitutional violations." *Estes v. Morris*, 142 F.3d 433 (table), 1998 WL 69009, at *2 (6th Cir. Feb. 11, 1998).

damages). As a result, McKay cannot, on any set of facts, maintain his section 1983 suit against Defendants in their official capacities to the extent he is seeking damages for past constitutional violations. Plaintiff's remaining section 1983 claims against Defendants for prospective injunctive relief and against Defendant Brook Thompson individually for injunctive relief and damages include: 1) unconstitutional burdening of his right to vote, 2) deprivation of his right to vote without due process of law, 3) violation of both Privileges and Immunities Clauses and 4) unconstitutional interference with his First Amendment right to free exercise of religion. These claims are discussed below.

First, McKay claims his right to vote was unconsitutionally conditioned on the disclosure of his SSN. He relies on a Fourth Circuit opinion in which the Court held the plaintiff's "right to vote [was] substantially burdened by the public disclosure of his [SSN]." *Greidinger v. Davis*, 988 F.2d 1344,1354 (4th Cir. 1993). That case held "Virginia's voter registration scheme impose[d] a substantial burden on [plaintiff's] fundamental right to vote only to the extent the scheme permit[ted] the public disclosure of his SSN." *Id.* At n.10. Because the Fourth Circuit held Virginia's statutory scheme substantially burdened an individual's right to vote, it applied a strict scrutiny analysis and required the state to show the scheme was narrowly tailored to serve a compelling state interest. *Id.* At 1352-54. The Court in *Greidinger* specifically stated, however, "[I]f the scheme provided for only the receipt and internal use of the SSN by Virginia, no substantial burden would exist." *Id.*

McKay's situation can be distinguished from that of the plaintiff in *Greidinger*. In *Greidinger*, Virginia stipulated it routinely disclosed SSN's along with other voter registration information to political parties and candidates and

made no effort to redact the SSN's from voter registration records made available to the public. During the preliminary injunction hearing in this case, Defendants maintained Tennessee has a policy of not disclosing voters' SSN's. McKay maintains the possibility of public disclosure still exists as a court could order the Election Commission to provide such information. He has not presented any evidence that a court has ever done so. This argument is speculative at best. *Tenn. Code Ann.* § 2-2-127 on which McKay relies states, "[p]ermanent [voter] registration records as public records shall be kept in a safe place by the commission, shall be available for public inspection, and may not be removed from the office of the commission except as required ..." The statute requires only that permanent records be kept and made available to the public. It does not mandate inclusion of information regarding voters' SSN's. This provision was amended by Public Chapter No. 88, which went into effect on April 12, 1999. As it is now written, section 2-2-127 requires SSN's to be redacted from "any voter registration records" before making them available to the public.

Similarly, another statute upon which McKay relies, *Tenn. Code Ann.* § 2-2-138, requires the commissioners of elections to prepare lists of registered voters. These lists "and any other voter registration information ... *if compiled*," (emphasis added) must then be made available for purchase. While the Court concedes a list of voters' SSN's might theoretically be compiled along with their names, birth dates, addresses and other information, section 2-2-138 does not require compilation or disclosure of this information. In light of Tennessee's policy of non-disclosure as well as the amendments to section 2-2-127 prohibiting disclosure of SSN's, the purely speculative possibility of public disclosure does not present the "substantial burden" that justified the Fourth Circuit's ruling in *Greidinger*.

The Court concludes Plaintiff has failed to present evidence sufficient to support a conclusion Tennessee law conditions a person's right to vote on public disclosure of his or her SSN. The statutory scheme provides "for only the receipt and internal use" by Tennessee of a registered voter's SSN. *Greidinger*, 998 F.2d at 1354, n. 10. As a result, the disclosure required by section 2-2-116 does not constitute a substantial burden requiring strict scrutiny analysis. *See, id.*, at 1352-54. Even assuming the burden was still substantial enough to justify strict scrutiny, this Court agrees with the Fourth Circuit that a statutory scheme providing only for internal receipt and use of voters' SSN's is narrowly tailored to serve the compelling state interest of "identifying voter duplication and tracking felons." Id. At 1354, n. 11. As a result, the Court holds McKay cannot, as a matter of law, prevail on a section 1983 action premised upon the argument section 2-2-116 unconstitutionally burdens his right to vote.

In his second constitutional challenge, McKay asserts he has been deprived of his right to vote without due process of law, a violation of the Fifth and Fourteenth amendments. He argues he has not been convicted of any crime for which the right to vote may be denied. This argument is true, however, the state may require him to be registered in order to vote. Furthermore, as discussed above, the state of Tennessee may also require McKay to disclose his SSN, along with other information as a prerequisite to registration. Like everyone else in this state, Plaintiff could have registered to vote at any time had he chosen to comply with the uniformly applied statutory requirements. Because there is nothing unconstitutional about Tennessee's voter registration scheme, and because McKay's right to vote was denied pursuant to this validly enacted scheme, his due process challenge to the State's action fails as a matter of law.

McKay also asserts section 2-2-116 violates the Privileges and Imunities Clause of Article 4, Section 2 and the Fourteenth Amendment. The Privileges and Imunities Clause of Article 4, Section 2 requires only that states give to every citizen of every other state the same privileges and immunities that their own citizens enjoy. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 511 (1939). McKay was treated as all Tennessee residents are treated. Defendants did not discriminate against him in any way because everyone, whether a citizen of the state or not, must comply with the Tennessee voter registration laws in order to vote in Tennessee. This includes providing a SSN as required by section 2-2-116. Because section 2-2-116 applies to everyone, regardless of his or her state citizenship, it does not violate the Privileges and Immunities Clause of Article 4, Section 2.

The Privileges and Immunities Clause of the Fourteenth Amendment, on the other hand, protects only those rights unique to national citizenship. *Shapiro v. Thompson*, 394 U.S. 618, 667 (1969); *see also Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 79-80 (1873). This provision in essence prevents the states from abridging the rights given to all U.S. citizens by operation of Constitutional and federal law. These rights include the right to vote in federal elections. *Slaughter-House Cases*, 83 U.S. (16 Wall) at 79. The Court presumes this is the right McKay claims is abridged by section 2-2-116. Section 2-2-116 does place a limitation on an individual's right to vote in federal elections. "However, the Supreme Court has indicated that the Privileges and Immunities Clause of the Fourteenth Amendment affords no protection where Congress has imposed or authorized the infringement." *Storer v. French*, 58 F.3d 1125, 1128 (6th Cir. 1995).

In this case, Congress, in the Privacy Act of 1974, specifically authorizes the states to require disclosure of SSN's as a prerequisite to voter registration, provided the statutory scheme requiring disclosure falls within the exemption provision of section 7(a)(2). As discussed in part III. B. above, section 2-2-116 satisfies all of the 7(a)(2) exemption conditions. In this case, therefore, any abridgement of McKay's right to vote has been authorized by Congress by way of section 7(a)(2) of the Privacy Act. As a result, under the rule set forth in *Storer*, section 2-2-116 does not violate the Privileges and Immunities Clause of the Fourteenth Amendment.

In his final constitutional challenge, McKay claims section 2-2-116 unconstitutionally infringes his First Amendment right to free exercise of religion. The United States Court of Appeals for the Sixth Circuit follows the standard set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990), when evaluating free exercise challenges. *Kissinger v. Board of Trustees*, 5 F.3d 177, 179 (6th Cir. 1993). This standard requires the Court to uphold a state law that is rationally related to a legitimate state purpose, provided the law is: 1) generally applicable, 2) not aimed at particular religious practices, and 3) free of a system of particularized exemptions. *Smith*, 494 U.S. at 877-78. After evaluating section 2-2-116 in light of these criteria, the court concludes the law does not unconstitutionally infringe Plaintiff's right to vote.

First, section 2-2-116 is generally applicable. All potential voters must disclose their SSN's, if they have one, in order to register. On its face, the law appears to be neutral, and McKay has not presented any evidence it is aimed at a particular religious group or practice. Nor does

the law contain a system of particularized exemptions. McKay argues section 2-2-116 exempts those who do not have SSN's, however, this is not a particularized exemption. Tennessee requires everyone who has a SSN to disclose it. The State does not distinguish between similarly situated individuals, allowing some to claim an exemption from the law's application, while others may not. Finally, the disclosure requirement is, at the very least, rationally related to the legitimate state interests of preventing voter fraud and identifying felons ineligible to vote. Because section 2-2-116 satisfies the criteria set forth in *Smith*, it does not unconstitutionally burden McKay's First Amendment right to free exercise of religion by requiring him to disclose his SSN as a prerequisite to voting.

In his Complaint, McKay offers two arguments against application of the *Smith* standard in this case. First, he argues *Smith* applies only in those cases where the religious conduct is prohibited by law. Cases in this circuit, however, have applied *Smith* in situations involving affirmative conduct, required by the State but prohibited by an individual's religious beliefs. In *Kissinger*, the court used the Smith criteria to evaluate Ohio State University's requirement all students complete a course in "Operative Practice" in order to graduate from the College of Veterinary Medicine. *Kissinger*, 5 F.3d at 178-179. Like section 2-2-116, the curriculum addressed in *Kissinger* required an individual to engage in affirmative conduct in order to be entitled to a benefit from the state. In spite of this possible grounds for distinction, the Sixth Circuit still held *Smith* applicable. This Court is therefore compelled to apply the *Smith* criteria in this case.

McKay's second argument against application of *Smith*, is similarly unpersuasive. In *Smith*, the United States

Supreme Court implied the traditional strict scrutiny standard might still be applicable in those cases involving a hybrid of rights where a Free Exercise claim was coupled with a claim the contested state law or policy infringed another fundamental right. *Smith*, 494 U.S. at 881. McKay argues, under this rationale, strict scrutiny should be applied in this case because section 2-2-116 infringes his right to vote as well as his freedom of religion. The Sixth Circuit unequivocally rejected this reasoning in *Kissinger*. "[A]t least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in Smith to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Kissinger*, 5 F.3d at 180.

As discussed above in this section, *Tenn. Code Ann.* 2-2-116 does not unconstitutionally burden or infringe upon McKay's right to vote. Even assuming, for the sake of argument, that McKay's right to vote were somehow implicated along with his Free Exercise rights, a strict scrutiny analysis would still be rendered inappropriate by the Sixth Circuit's holding in *Kissinger*. When evaluating generally applicable, exceptionless state regulations under the Free Exercise Clause, the Court is required by Sixth Circuit precedent to apply the standard set forth in *Smith*. An application of this standard leads to the conclusion *Tenn. Code Ann.* § 2-2-116 does not unconstitutionally infringe McKay's First Amendment right to free exercise of religion.

IV. CONCLUSION

After reviewing all of the evidence in the light most favorable to Plaintiff, the court concludes, as a matter of law, McKay cannot prove his federal statutory or constitutional

claims at trial. Therefore, for the foregoing reasons, Defendants Motion for Summary Judgement should be **GRANTED.** An order shall enter.

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Entered 02/26/99]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,

Defendant

No. 1:98-CV-354
Collier / Powers

SCHEDULING ORDER

1. ***Introduction***: Pursuant to Fed. R. Civ. P. 16(b) a scheduling conference was held in this cause on **February 19, 1999**. Present representing the plaintiff were attorney **Jes Beard**. Present representing the defendant were attorney **Janet Kleinfelter and William Marett**. The following action was taken.

2. ***Jurisdiction***: In this case, the subject matter jurisdiction of the Court has been invoked pursuant to **28 U.S.C. § 1331** and is in dispute.

3. ***Consent To Magistrate Judge***: The parties **do not** consent that all proceedings in this case may be conducted by a United States Magistrate Judge in accordance with 28 U.S.C. § 636(c).

4. ***Settlement / Alternative Dispute Resolution***

(a) The possibility of settlement is **unlikely** at this time.

5. ***Disclosure and Discovery***:

(a) ***Fed. R. Civ. P. 26(f) Meeting***: The parties will hold a discovery planning meeting by telephone as required by Rule 26(f) on **March 18, 1999 at 11:00 a.m.** Mr. Marett will initiate the call.

(b) ***Discovery Plan***: At the Rule 26(f) meeting the parties shall develop a discovery plan and file it with the Court within ten (10) days after said meeting. This discovery plan shall conform to the provisions of Fed. R. Civ. P. 26(f).

(c) ***Expert Testimony***: Disclosure of any expert testimony in accordance with Fed. R. Civ. P. 26(a)(2) shall be made by all parties on or before **June 1, 1999**.

(d) ***All Discovery***: All discovery, including the taking of depositions "for evidence" shall be completed by **July 12, 1999**.

6. ***Other Scheduling Matters***:

(a) ***Dispositive Motions***: All dispositive motions under Fed. R. Civ. P. 12 and all motions for summary judgement pursuant to Fed. R. Civ. P. 56 shall be filed as soon as possible, but no later than August 31, 1999. The failure to timely file such motions will be grounds to summarily deny them.

SO ORDERED.

ENTER:

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX F

[Entered 11/24/98]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
At CHATTANOOGA

MARTIN S. MCKAY,
Plaintiff,

v.

BROOK THOMPSON, individually and as
Coordinator of Elections,
State of Tennessee,
RILEY C. DARNELL, Secretary of State,
State of Tennessee,
CAROLYN JACKSON, individually and as
Administrator of Elections,
Hamilton County, Tennessee,
CLAUDE RAMSEY, County Executive,
Hamilton County, Tennessee,

Defendants

No. 1:98-CV-354
Judge Curtis L. Collier

ORDER

Before the court is Plaintiff Martin S. McKay's Motion To Amend (Court File No. 10). McKay seeks to

amend his Complaint to include a request for injunctive relief under 42 U.S.C. § 1983. Rule 15(a) of the Federal Rules of Civil Procedure states, in pertinent part, "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." As yet, there has not been a response to McKay's Complaint. Accordingly, McKay's Motion To Amend is **GRANTED**. McKay is **ORDERED** to file an amended complaint within fifteen (15) days of the entry of this Order.

SO ORDERED.

ENTER:

/s/ CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX G

Intervention By United States (28 U.S.C. § 2403)

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

* * * * *

Civil Rights Act of 1964 (42 U.S.C. § 1971)

(a)(2) No person acting under color of law shall –

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified to under State law to vote in such election; …

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege

secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order ...

* * * * *

Privacy Act of 1974, Section 7 (P.L. 93-579 § 7)

(a)(1) It shall be unlawful for any Federal, State, or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the [The] provisions of paragraph (1) of this subsection shall not apply with respect to --

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of a individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

* * * * *

National Voter Registration Act of 1993 – Simultaneous Application For Voter Registration And Driver License (42 U.S.C. § 1973gg-3)

(a)(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under state law ...

(c)(2)(B) may require only the minimum amount of information necessary to --

(i) prevent duplicate voter registrations; and
(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

* * * * *

National Voter Registration Act of 1993 – Contents Of Mail Voter Registration Form (42 U.S.C. § 1973gg-7)

(b)(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

* * * * *

Qualified Voter (TENN. CODE ANN. § 2-2-102)

A citizen of the United States eighteen (18) years of age or older who is a resident of this state is a qualified voter unless the citizen is disqualified under the provisions of this title or under a judgement of infamy pursuant to § 40-20-112.

* * * * *

Registration Form (TENN. CODE ANN. § 2-2-116)

(c) The permanent registration record shall be substantially as follows, shall contain all the information required before being signed by the registrant, and shall be witnessed as indicated on the form.

Item 5. Social Security Number, if any

* * * * *

Permanent Registration Records Open To Inspection (TENN. CODE ANN. § 2-2-127)

Prior To Modification

Permanent registration records as public records shall be kept in a safe place by the commission, shall be available for public inspection, and may not be removed from the office of the commission except as required for the performance of duties under this title or in compliance with court orders.

Modification Effective April 12, 1999

(a) Permanent registration records as public records shall be kept in a safe place by the commission, shall be available for public inspection, and may not be removed from the office of the commission except as required for the

performance of duties under this title or in compliance with court orders; provided that a registrar shall make a reasonable effort to redact a person's social security number from a record before such record is made available to any person other than the holder of the number if such record is stored in a computer readable format on April 12, 1999. When such records are first stored in a computer readable format or when changes are made to any computer program that stores or accesses records, a registrar shall redact a person's social security number from a record before such record is made available to any person other than the holder of the number. The coordinator of elections shall also redact the social security number before making any voter registration records available to the public.

* * * * *

Voter Registration Lists – Purchase By Citizens
(TENN. CODE ANN. § 2-2-138)

(a) In counties of this state having a population in excess of one hundred eighty thousand according to the United States census of 1970 or any subsequent United States census, or in any computerized county, it is the duty of the commissioners of elections to prepare or cause to be prepared each month a listing, by voting precinct, of all persons registered to vote in each precinct during the preceding month.

(b) Such list, and any other voter registration information such as voter history, if compiled, shall be available for purchase for a price not to exceed the cost of production ...

APPENDIX H

Stipulation By Parties That Plaintiff Attempted To Register To Vote Using A Mail-In Application
Hearing For Preliminary Injunction (TR 69, lines 23-25; TR 70, lines 1-9)

THE COURT: Call your next witness.

MR. BEARD: Your Honor, it's my understanding that the agreement on – or along with the submission of Exhibit 30 is the understanding that, in fact, Mr. McKay did fill that out, received it, submitted it, returned it, and that that was the application which is headed up at the top "Mail-In Application." As long as all that is agreed to, then I don't have anything further, Your Honor.

MS. KLEINFELTER: We agree to it. We all agree to that, Your Honor.

THE COURT: Okay. Apparently there is a stipulation.

Parties At Preliminary Injunction Hearing

Mr. Beard	Counsel For Plaintiff
Ms. Kleinfelter	Counsel For State Defendants